Guideline Sentencing Update

a publication of the Federal Judicial Center *volume 8, number 5, February 29, 1996*

Determining the Sentence

"Safety Valve" Provision

Tenth Circuit holds that §3553(f)(5) requires a defendant to divulge all known information about the offense and related conduct, not just defendant's own conduct. Defendant was convicted of conspiracy to possess cocaine with intent to distribute. The district court departed downward from the 10-year mandatory minimum after concluding that, because defendant wrote a letter detailing his own involvement in the conspiracy, he qualified for the "safety valve" departure under 18 U.S.C. §3553(f), USSG §5C1.2. The government appealed, arguing that defendant's refusal to talk about others involved in the conspiracy violated the requirement in §3553(f)(5) to "truthfully provide to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan." The government claimed that a defendant must "tell the government all he knows about the offense of conviction and the relevant conduct, including the identities and participation of others," but defendant argued that he need only detail his own personal involvement in the crime.

The appellate court agreed with the government and remanded. "The phrase 'all information and evidence' is obviously broad. The Application Notes to §5C1.2 define 'offense or offenses that were part of the same course of conduct or of a common scheme or plan' to mean 'the offense of conviction and all relevant conduct.' USSG §5C1.2, comment. (n.3). 'Relevant conduct' has in turn been defined to include 'in the case of a jointly undertaken criminal activity . . . all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity.' USSG §1B1.3(a)(1)(B). Thus, the guidelines appear to require disclosure of 'all information' concerning the offense of conviction and the acts of others if the offense of conviction is a conspiracy or other joint activity. As applied to Mr. Acosta-Olivas, the guideline would therefore require disclosure of everything he knows about his own actions and those of his co-conspirators." The court rejected defendant's argument that this interpretation essentially duplicates USSG §5K1.1, noting that under §3553(f) the decision is made by the court and does not require a government motion, and the information does not have to be "relevant or useful" to the government.

"We therefore hold that the district court erred in interpreting §3553(f)(5) to require a defendant to reveal only information regarding his own involvement in the crime, not information he has relating to other participants. . . . If, at resentencing, the court makes a factual finding that, in deciding what information to disclose to the government, Mr. Acosta-Olivas relied upon the district court's interpretation of §3553(f)(5), the court shall allow him the opportunity to comply with the statute as this court has interpreted it in this opinion."

U.S. v. Acosta-Olivas, 71 F.3d 375, 377–80 (10th Cir. 1995).

Seventh Circuit holds that §3553(f) requires affirmative offer of information by defendant, does not duplicate USSG §3E1.1, and does not violate Fifth Amendment rights. Defendant pled guilty to conspiracy to distribute crack cocaine and was sentenced to a 10-year mandatory minimum term. He argued that he qualified for a lower term under 18 U.S.C. §3553(f) because he stipulated to the facts of the offense in his plea agreement and the government never requested additional information. The district court denied his §3553(f) motion, however, because defendant made no further attempts to cooperate with the government and reveal additional details of the offense.

The appellate court affirmed, concluding that "§3553(f) was intended to benefit only those defendants who truly cooperate. Thus, to qualify for relief under §3553(f), a defendant must demonstrate to the court that he has made a good faith attempt to cooperate with the authorities. . . . Although he stipulated to the basic details of his offense conduct, he made no further efforts to cooperate. He failed to respond to a proffer letter sent by the government outlining the terms that would apply (*e.g.,* limited immunity) if he provided additional information. Furthermore, he did not initiate any contact with government officials offering to provide details of his involvement in drug dealing. Specifically, the government notes that [defendant] could have at least provided the name of the 'source' who sold him the crack cocaine. Before granting relief under §3553(f), the court may reasonably require a defendant to reveal information regarding his chain of distribution. . . . [I]t is [defendant's] duty to satisfy the court that he has 'truthfully provided to the Government all [of the] information and evidence . . . [that he] has concerning the offense.' . . . Although [defendant] is not required to provide information that the government expressly states that it does not want, he at least must offer what he has." *See also U.S. v. Wrenn,* 66 F.3d 1, 3 (1st Cir. 1995) (§3553(f) "con-

templates an affirmative act of cooperation with the government") [8 *GSU* #1].

The court also rejected defendant's claim that it was inconsistent to deny his §3553(f) motion after granting him the three-level reduction for acceptance of responsibility under §3E1.1, which required him to "truthfully admit[] the conduct comprising the offense(s) of conviction." "Although §3E1.1(a) forbids a defendant from falsely denying relevant conduct, . . . it imposes no duty on a defendant to volunteer any information aside from the conduct comprising the elements of the offense. . . . In contrast, §3553(f) states that a defendant must disclose 'all information' concerning the course of conduct—not simply the facts that form the basis for the criminal charge. Accordingly, the district court correctly held that §3553(f)(5) requires more than §3E1.1(a)."

Defendant's final argument, that requiring him to volunteer information of his criminal conduct beyond the offense of conviction violates his Fifth Amendment right against self-incrimination, also failed. "[R]equiring defendants to admit past criminal conduct in order to gain relief from statutory minimum sentences does not implicate the right against self-incrimination. In a similar line of cases, we have held that requiring a defendant to admit criminal conduct related to but distinct from the offense of conviction in order to gain a reduction for acceptance of responsibility does not implicate the Fifth Amendment" because it does not penalize defendants but denies a benefit. "The same is true of §3553(f), which requires a defendant to provide complete and truthful details concerning his offense in order to qualify for a sentence below the statutory minimum."

U.S. v. Arrington, 73 F.3d 144, 148–50 (7th Cir. 1996).

Second and Ninth Circuits hold that downward criminal history departure for defendant with more than one criminal history point cannot qualify defendant for §3553(f). In the Second Circuit, defendant faced a five-year mandatory minimum on a cocaine charge. He had four criminal history points, but the district court concluded that overrepresented his criminal history and departed under §4A1.3 to criminal history category I, which resulted in a guideline range of 57–71 months. The court imposed a 60-month sentence after rejecting defendant's argument that he qualified for a departure under 18 U.S.C. §3553(f) because the departure effectively left him with only one criminal history point.

The appellate court affirmed. "Section 3553(f) states that the safety-valve provision is to apply only where 'the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines.'" The relevant guideline, §5C1.2, has commentary that "interprets this passage to mean 'more than one criminal history point as determined under §4A1.1 (Criminal History Category).' U.S.S.G. §5C1.2 comment. (n.1). Section 4A1.1 is the schedule that specifies how a sentencing court should calculate a defendant's criminal history points. It is not disputed that Resto has four criminal history points, as determined under §4A1.1. Notwithstanding that the sentencing judge elected to depart by treating Resto as falling in Criminal History Category I, rather than Category III where his four points originally placed him, he nonetheless has four criminal history points. He is thus ineligible for the safety valve provision of §3553(f)."

U.S. v. Resto, 74 F.3d 22, 27–28 (2d Cir. 1996).

The Ninth Circuit defendant was convicted of a methamphetamine offense and faced a 10-year mandatory minimum. He had two criminal history points under §4A1.2(c)(1) for two offenses of driving with a suspended license, and was thus ineligible for departure under §3553(f). The district court held that criminal history category II overrepresented defendant's criminal history and departed under §4A1.3 to category I and a guideline range of 108–135 months, but concluded that this did not make defendant eligible for a §3553(f) departure and sentenced him to 120 months.

The appellate court agreed and affirmed. Under §3553(f)(1) the district court "must find *inter alia* that 'the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines.' . . . Section 3553(f) is not ambiguous. It explicitly precludes departure from the mandatory minimum provisions of 21 U.S.C. §841 if the record shows that a defendant has more than one criminal history point. . . . Assuming arguendo that there is merit to [defendant's] argument that a mandatory minimum sentence should not be imposed where the criminal history category overrepresents the seriousness of a defendant's prior criminal history, only Congress can provide a remedy."

U.S. v. Valencia-Andrade, 72 F.3d 770, 773–74 (9th Cir. 1995).

See *Outline* generally at V.F for all cases above.

Departures

Mitigating Circumstances

First Circuit holds departure may be considered when enhancement based on acquitted conduct mandates life sentence. Defendant was tried in state court for murder and was acquitted. Later he was indicted in federal court on firearms and other charges arising out of the murders. Convicted on two counts, defendant was sentenced under §2K2.1 (Nov. 1990) for the firearms offense. Section 2K2.1(c)(2) directed that if defendant "used or possessed the firearm in connection with the commission or attempted commission of another offense, apply §2X1.1 . . . in respect to that other offense, if the resulting offense level is greater than that determined above." The court

found that the murders were "another offense," that defendant had committed the murders, and that the "object offense" for purposes of §2X1.1 was first degree murder. That gave defendant an offense level of 43, which, because he qualified for no reductions, mandated a sentence of life imprisonment. (Later versions of the Guidelines give the same result.) Defendant's sentence on the firearms count without applying §2K2.1(c)(2) would have been 30–37 months, but his total sentence would have been 262–327 months because he qualified as an armed career criminal on the other count.

The appellate court rejected defendant's claim that the method by which the sentence was reached violated due process, but held that the district court erred in thinking it did not have discretion to consider downward departure in this situation. Noting that the Supreme Court "has cautioned against permitting a sentence enhancement to be the 'tail which wags the dog of the substantive offense,'" the court concluded that this was such a case. "The effect here has been to permit the harshest penalty outside of capital punishment to be imposed not for conduct charged and convicted but for other conduct as to which there was, at sentencing, at best a shadow of the usual procedural protections such as the requirement of proof beyond a reasonable doubt. . . . When put to that proof in state court, the government failed. The punishment imposed in view of this other conduct far outstripped in degree and kind the punishment Lombard would otherwise have received for the offense of conviction." Under §2K2.1 "the cross-reference to the first-degree murder guideline essentially *displaced* the lower Guidelines range that otherwise would have applied. As a result, the sentence to be imposed for Lombard's firearms conviction was the same as the sentence that would have been imposed for a federal murder conviction: a mandatory term of life. Despite the nominal characterization of the murders as conduct that was considered in 'enhancing' or 'adjusting' Lombard's firearms conviction, the reality is that the murders were treated as the gravamen of the offense." The court also noted that "in *no circumstances* under Maine law would Lombard have been subject to a *mandatory* life sentence. . . . We would be hard put to think of a better example of a case in which a sentence 'enhancement' might be described as a 'tail which wags the dog' of the defendant's offense of conviction."

Following the principles governing departure set forth in *U.S. v. Rivera,* 994 F.2d 942 (1st Cir. 1993), the court held that "the district court had authority to avoid any unfairness in Lombard's sentence through the mechanism of downward departure. . . . The facts and circumstances of this case present a whole greater than the sum of its parts and distinguish it, from a constitutional perspective, from other cases that have involved facially similar issues. The specific question from the perspective of the Guidelines and under U.S.S.G. §5K2.0 is whether these features of the case—*e.g.,* the state court acquittal and the fact that the federal sentence may exceed any state sentence that would have attached to a murder conviction; the paramount seriousness of the 'enhancing conduct'; the magnitude of the 'enhancement'; the disproportionality between the sentence and the offense of conviction as well as between the enhancement and the base sentence; and the absence of a statutory maximum for the offense of conviction—taken in combination, make this case 'unusual' and remove it from the 'heartland' of the guideline (§2K2.1) that yielded the mandatory life sentence. This case is outside the 'heartland.'"

U.S. v. Lombard, 72 F.3d 170, 174–87 (1st Cir. 1995).

See *Outline* generally at VI.C.5.a.

Sixth Circuit remands to consider downward departure based on coercion or duress. Defendant and her husband committed bank fraud in several states. She pled guilty to bank fraud, conspiracy, and firearms violations, and was sentenced to 46 months. The record indicated that defendant "has significant emotional problems and a history of drug and alcohol abuse associated with her experience of sexual and emotional abuse as a child. She also appears to have suffered serious physical and emotional abuse at the hands of Mr. Hall (her husband). Her reports of violence and gun-threats by Mr. Hall were corroborated by him in letters he wrote to her from prison." The appellate court noted that "[i]t would not be unreasonable to conclude that her husband beat and cajoled her into submission to his will," and a psychological evaluation of defendant described her as suffering from "post traumatic stress disorder" and "Battered Person Syndrome." On appeal, defendant argued that the district court failed to recognize its discretion to consider these circumstances as a basis for downward departure.

The appellate court agreed and remanded, holding that "there is overwhelming evidence that the Defendant's criminal actions resulted, at least in part, from the coercion and control exercised by her husband. On the record before us, she had not been involved in any bank fraud schemes before she met Mr. Hall, and, according to the forensics evaluation of the Bureau of Prisons, she continued her criminal activity only after he threatened to kill himself, to kill her, to hurt their friends and pets, and to commit bank robbery using violent means. . . . His own letters to Ms. Hall from prison describe scenes from the past in which he threatened her with a gun. . . . These circumstances indicate that a departure may be appropriate under U.S.S.G. §5K2.12, which permits departure because of serious coercion not amounting to a complete defense . . . . The failure of the probation report and the district court to take note of these circumstances or to discuss this issue indicates that it was not aware of the applicability of §5K2.12 and of its discretion to depart downward. It must consider coercion as a basis for depar-

ture. We therefore remand to the district court to make findings of fact and conclusions of law as to whether downward departure is appropriate for this Defendant, noting in particular the coercive effect of her husband's abuse in light of her related emotional problems."

U.S. v. Hall, 71 F.3d 569, 570–73 (6th Cir. 1995).

See *Outline* at VI.C.4.a.

D.C. Circuit rejects sentencing entrapment claim. Defendants were convicted on charges relating to four crack cocaine sales to undercover agents and, because of the amount involved and prior convictions, received mandatory life sentences under 21 U.S.C. §841(b). They argued that they should have been sentenced as if they sold powder cocaine rather than crack because the agents had insisted that the cocaine be in the form of crack and, at the first sale, refused to buy the powder cocaine defendants tried to sell until defendants found someone to "cook" it into crack. At trial, when one of the agents was asked why they insisted on crack rather than powder, he stated: "Well, crack cocaine is less expensive than [powder] cocaine, and we felt like through our investigation, that it takes fifty grams of crack cocaine to get any target over the mandatory ten years." Defendants claimed this demonstrated sentencing entrapment by the government.

The appellate court rejected defendants' claims and indicated that it did not view sentencing entrapment as a viable defense. "The theory appears to be that if the government induces a defendant to commit a more serious crime when he was predisposed to commit a less serious offense, the defendant should be sentenced only for the lesser offense. . . . But the Supreme Court has warned against using an entrapment defense to control law enforcement practices of which a court might disapprove. . . . The main element in any entrapment defense is rather the defendant's 'predisposition'—'whether the defendant was an "unwary innocent" or, instead, an "unwary criminal" who readily availed himself of the opportunity to perpetrate the crime.' . . . Persons ready, willing and able to deal in drugs—persons like [defendants]—could hardly be described as innocents. These defendants showed no hesitation in committing the crimes for which they were convicted. Alone, this is enough to destroy their entrapment argument."

The court also rejected the possibility of an "outrageous-conduct defense" to reduce a statutorily-mandated sentence. If the government's conduct were so outrageous as to violate due process it would preclude prosecution. If the conduct was not that outrageous—"if, in other words, there was no violation of the Due Process Clause—it follows that those actions cannot serve as a basis for a court's disregarding the sentencing provisions."

U.S. v. Walls, 70 F.3d 1323, 1328–30 (D.C. Cir. 1995). *See also U.S. v. Miller,* 71 F.3d 813, 817–18 (11th Cir. 1996) (remanded: reiterating earlier holding "that sentencing entrapment is a defunct doctrine" and rejecting theory of "partial entrapment," holding district court could not sentence defendant as if he had sold powder instead of crack cocaine—defendant was clearly disposed to sell cocaine and arranged sale of crack after initial deal for powder fell through). *But see U.S. v. McClelland,* 72 F.3d 717, 725–26 (9th Cir. 1995) (affirming "imperfect entrapment" departure for defendant convicted in murder-for-hire attempt—although defendant initiated plan to kill his wife, he repeatedly expressed reluctance to carry it out and only went forward after the undercover informant defendant had asked to do the killing "repeatedly pushed McClelland to go forward").

See *Outline* at VI.C.4.c.

Note to Readers:

Beginning this year the Center will publish *Guideline Sentencing: An Outline of Appellate Case Law on Selected Issues* once per year, instead of twice as we have in the past. We anticipate that the next issue will be distributed in July or August.

Guideline Sentencing Update, vol. 8, no. 5, February 29, 1996
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